In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-229

INTERNATIONAL PRINTING PRESSMAN AND ASSISTANTS' UNION OF NORTH AMERICA, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. B) is unreported. The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1971. The petition for a writ of certiorari was filed on June 2, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 60-day time limit of Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 for the institution of suit against a union by the Secretary of Labor may be waived by agreement between the Secretary and the union.

STATUTE INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. 482, provides:

> (a) A member of a labor organization—
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> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
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> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

STATEMENT

The sole issue raised by the petition concerns the timeliness of a suit by the Secretary of Labor challenging the validity of an international union election under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481, *et seq.*

After an election for officers of the petitioner union was held in February 1968, certain union members, after duly exhausting internal union remedies, filed complaints with the Secretary pursuant to Section 402(a) of the Act, *supra*, concerning the conduct of the election. Under Section 402(b) of the Act, *supra*, the Secretary, if he "finds probable cause to believe that a violation of this subchapter has occurred and

has not been remedied," is empowered to bring an action against the union to set aside the election "within sixty days after the filing of such [a] complaint."

Upon receiving the union members' complaint, the Secretary undertook an investigation and attempted to negotiate a settlement with the union (Pet. App. 12). Because these proceedings took a considerable length of time, the union twice agreed to extend the time in which the Secretary might bring suit (Pet. App. 12), expressly waiving, through its general counsel, "any and all defenses relating to the timeliness of any act or action required to be taken by the Secretary of Labor under Section 402 of the LMRDA which it might otherwise have * * *" (Court of Appeals Appendix, pp. 5, 6).

The settlement discussions ultimately failed to resolve the dispute and the Secretary, relying upon the waiver, brought suit under the Act approximately 120 days after the filing of the complaints by the union members (Pet. App. 12), but before the extended time period agreed to by the union had expired. The union in its answer, in keeping with its agreement, did not plead the 60-day time limit specified by Section 402(b) as a defense (Pet. App. 12). The district court nevertheless dismissed the action, *sua sponte*, for want of jurisdiction over the subject matter on the ground that the Act's 60-day time limitation was "jurisdictional" and could not be waived by a union (Pet. App. B).

The court of appeals reversed the judgment of the district court, and remanded for consideration of the Secretary's complaint. The court noted that "[t]he

basic question is whether in view of the congressional purpose any equitable considerations should be allowed to toll the limitation" (Pet. App. 20). The court concluded that "the congressional intent and purpose in enactment of Title IV is best served by holding that the waiver of the 60-day time limit and the reliance thereon tolled the time limitation and acted to estop its assertion by appellee [petitioner]" (Pet. App. 20).

ARGUMENT

The union contends that even though it expressly waived the 60-day time limitation of Section 402(b) in order to permit settlement negotiations with the Secretary, the Secretary is nevertheless barred by the 60-day time limitation from bringing this suit. It is clear, however, that the court of appeals properly construed Section 402(b) to prevent such an inequitable result. Accordingly, review of that decision is unwarranted.

1. This Court has indicated that whether a statutory time limitation can be waived depends upon "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 427. See also *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231. The legislative history of the election provisions of Title IV shows that Congress was concerned about disruptions of union affairs and discontinuities in union authority that might result from the extended judicial review of

elections provided by the Act. See S. Rep. No. 187, 86th Cong., 1st Sess., p. 22. Accordingly, the 60-day time limit was inserted in Section 402(b) to promote the resolution of union electoral disputes in the shortest possible time in order to free the union and the successful candidates from the suspicion of electoral malfeasance as quickly as possible and to enable them to act effectively in behalf of the union membership. To minimize these disruptions, it was also provided that the results of a union election would be presumed valid until proved otherwise and that the newly-elected officers would assume their responsibilities immediately pending resolution of the dispute. See Section 402(a), *supra.*

While the 60-day rule was designed to end as expeditiously as possible uncertainties arising out of elections, it does not follow that the time limit cannot be waived. The time limit is intended to benefit the union and its officers in removing doubts about their authority and reputation. See *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 468, n.7. Hence they should themselves be able to determine when the need for expedition is outbalanced by the interest in a thorough investigation of the charges or in settlement negotiations—either of which may be time consuming and may delay institution of the suit beyond the 60-day period, even while perhaps offering hope of a quicker ultimate resolution of the dispute than could be achieved by litigation.

Congress has expressed a decided preference for the resolution of intra-union conflicts by all processes

short of litigation. Construing Section 402, this Court has noted that, even when an election violates the Act, "the stated commitment is to postpone governmental intervention until the union is afforded the opportunity to redress the violation." *Wirtz* v. *Local 153*, *supra*, 389 U.S. at 472. And where governmental intervention is necessary, the statute envisions attempts by the Secretary "to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey*, 379 U.S. 134, 140. In the light of this preference to avoid litigation, the court below correctly interpreted Section 402(b) as permitting waiver of the 60-day limitation when, as here, settlement negotiations are in progress.

Moreover, waivers are necessary in order to allow the Secretary to conduct thorough investigations of complaints by union members prior to bringing suit. Section 402(b) provides that the Secretary must find "probable cause to believe that a violation of this subchapter has occurred and has not been remedied" before he may begin suit. The legislative history indicates that, in imposing the probable cause requirement, Congress looked with disfavor upon routine institution of suits to challenge union election practices. See S. Rep. No. 187, *supra*, p. 21. Accordingly, it conferred "a broad investigative power" on the Secretary. *Wirtz* v. *Local 125, Laborers' Int'l Union*, 389 U.S. 477, 485. The Secretary "may not initiate an action until his own investigation confirms that a violation of § 401 probably infected the challenged election." *Wirtz* v. *Local 153*, *supra*, 389

U.S. at 472. In the case of an international union election, as is involved here, the required investigation may involve many locals and it may not be possible to complete it within 60 days. In such circumstances, the purpose of the Act in assuring that a suit brought by the Secretary have a valid factual basis is furthered by a waiver of the 60-day limitation period.[1]

2. In an uncontroverted affidavit filed in behalf of the Secretary in the district court, it was pointed out that both the Secretary *and* the unions have long treated the 60-day time limitation of Section 402(b) as waivable (Pet. App. 17; Court of Appeals Appendix, pp. 33-35).[2] Since investigations are often extensive, the Department of Labor makes it a practice to accept agreements to extend the 60-day period when a union indicates an intention either to take voluntary remedial action or to consider the matter further before deciding whether to take remedial action. In fact, as the affidavit indicates, waivers of the time provisions are agreed to in more than half of all such cases. We submit that this long-standing contemporaneous administrative construction of Sec-

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[1] Although petitioner cites much legislative history in contending that the 60-day time limitation must be applied, the court of appeals accurately stated that there is no indication "that Congress ever considered when, if at all, the 60-day limitation would be subject to being tolled by equitable defenses" (Pet. App. 16).

[2] Extensions of the time limitation were, for example, agreed to in *Hodgson* v. *Local 6799, United Steelworkers*, No. 655, O.T. 1970, decided June 14, 1971 (see App. 5 and our brief p. 4 in that case).

tion 402(b) is entirely reasonable and consonant with the Act's purposes, and was properly upheld by the court below. See *Udall* v. *Tallman*, 380 U.S. 1, 16; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549.[3]

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[3] Petitioner argues that the decision below conflicts with *Wirtz* v. *Peninsula Shipbuilders Association*, 382 F. 2d 237 (C.A. 4). In that case, however, the Fourth Circuit indicated that Section 402(b) does not have the finality of an ordinary statute of limitations, but rather is merely "a directive to the Secretary which, *under certain circumstances*, he must follow." 382 F. 2d at 240 (emphasis added).

The decision of the district court, reversed by the court of appeals, is based on the theory of *The Harrisburg*, 119 U.S. 199, 214, that where the liability and remedy are created by the same statute, "the limitations of the remedy are * * * to be treated as limitations of the right." However, this Court has now rejected the conceptual dogma of *The Harrisburg*. *Burnett* v. *New York Central R.R. Co.*, *supra*; *Glus* v. *Brooklyn Eastern Terminal*, *supra*. The petition does not rely upon the doctrine of *The Harrisburg*.

Finally, even if Section 402(b) is construed as an ordinary statute of limitations, the limitation must be raised as an affirmative defense and thus cannot be the subject of *sua sponte* action by the district court. See Rule 8(c), Fed. R. Civ. P.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

L. PATRICK GRAY, III,
Assistant Attorney General.

WALTER H. FLEISCHER,
ROBERT E. KOPP,
Attorneys.

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